

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TREVOR STEVEN PASSAGE,

Defendant-Appellant.

UNPUBLISHED

July 25, 2013

No. 310015

Kalamazoo Circuit Court

LC No. 2011-001959-FH

Before: MURPHY, C.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

Following a jury trial, defendant Trevor Passage was convicted of breaking and entering, MCL 750.110, larceny in a building, MCL 750.360, first-degree retail fraud, MCL 750.356c, and second-degree retail fraud, MCL 750.356d. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 24 to 300 months' imprisonment for the breaking and entering conviction, 15 to 180 months' imprisonment for the larceny conviction, 15 to 240 months' imprisonment for the first-degree retail fraud conviction, and 365 days' imprisonment for the second-degree retail fraud conviction. Defendant appeals as of right, and we affirm.

Defendant argues that he is entitled to specific performance of an agreement he allegedly made with the prosecutor. Defendant claims that the prosecutor promised to dismiss defendant's habitual offender enhancement in exchange for defendant waiving his preliminary examination. MCR 2.507(G) precludes the enforcement of any disputed agreement between the parties unless the agreement was made in open court or evidence of the agreement is in writing and signed by the party against whom enforcement is sought. *People v Mooradian*, 221 Mich App 316, 318-319; 561 NW2d 495 (1997). This Court, citing MCR 6.001(D), which provides that the rules of civil procedure apply to the chapter on criminal procedure unless otherwise indicated, found that MCR 2.507(G) is applicable to a criminal case.¹ *Mooradian*, 221 Mich App at 319. On review of the record, we find that there is no indication whatsoever that the alleged agreement was made in open court or contained in a writing. Indeed, defendant fails to identify any document or hearing transcript in the record showing the existence of an agreement. During defendant's

¹ At the time that *Mooradian* was issued, the language currently found in MCR 2.507(G) was set forth in MCR 2.507(H).

sentencing hearing, he informed the trial court of the alleged agreement for the first time. The prosecutor who was present at defendant's sentencing hearing had no knowledge of the alleged agreement. Defense counsel appeared entirely oblivious as to any agreement. The trial court was also unaware of any agreement and noted that the record did not contain evidence of one. The record reflects that defendant waived his preliminary examination on January 26, 2012. There was no reference to the alleged agreement on the form used to show the preliminary examination waiver, which was signed by the parties. Thereafter, on January 31, 2012, the prosecutor filed a notice of intent to seek an enhanced sentence based on habitual offender status. The notice of intent was not objected to or otherwise challenged by defendant. Further, defendant's criminal pretrial summary reflected that the prosecution made an offer to defendant on February 13, 2012, weeks after defendant waived his preliminary examination, and the document indicated that defendant did not accept the offer.² Once again, we find no evidence in the record that the alleged agreement was made in open court or was reduced to a writing, let alone one signed by the prosecution. As a result, the purported agreement is not enforceable and defendant is not entitled to specific performance. MCR 2.507(G); *Mooradian*, 221 Mich App at 319.³

In the alternative, defendant argues that his trial counsel was ineffective for failing to enforce the terms of the alleged agreement. To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Based on the record, we find that defendant cannot establish a claim for ineffective assistance of counsel.

A "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Here, defendant argues that his counsel was ineffective for failing to enforce the terms of the alleged agreement and secure the dismissal of his habitual offender sentence enhancement. However, the record is devoid of any evidence that an enforceable agreement existed between the prosecution and defendant. Therefore, the factual predicate of defendant's ineffective assistance argument is lacking. Accordingly, defendant cannot establish that counsel's performance was deficient.

² It is impossible to decipher the handwritten offer scribbled on the pretrial summary by the prosecutor, but given that the preliminary examination had already been waived and that the offer, whatever its substance, was rejected, the offer could in no way be connected to the agreement alleged by defendant.

³ We would also note that the nature of the agreement claimed by defendant, i.e., an agreement not to seek habitual offender enhancement in exchange for a preliminary examination waiver, seems a bit unusual and one that we have never encountered. As noted by the prosecutor at sentencing, "obviously any agreements to drop . . . habitual offenders . . . are always contingent on the [d]efendant pleading guilty at that time and obviously that didn't happen[.]"

Defendant also requests a remand to the trial court for a *Ginther*⁴ hearing. To be entitled to a remand, defendant must show by affidavit or offer of proof that there are facts to support his claims. MCR 7.211(C)(1)(a). Here, defendant did not make an offer of proof or attach an affidavit to show any factual development that would justify remand. In fact, defendant simply states in his appellate brief that he “agreed to waive his preliminary examination in exchange for the dismissal of the habitual enhancement,” providing no elaboration regarding the circumstances, setting, individuals involved, and timeframe relative to the purported agreement. As a result, defendant has failed to show that this issue warrants remand and his request is denied.

Defendant also raises in his statement of questions presented the issues that he was denied due process rights and that his trial counsel was ineffective for failing to properly inform him of the state of his case. However, defendant failed to brief the merits of these claims. As a result, these issues are abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Affirmed.

/s/ William B. Murphy
/s/ Henry William Saad
/s/ Deborah A. Servitto

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).